IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

GARRY E. WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 03-3047-CM**
	)	
BOARD OF COUNTY COMMISSIONERS OF SHAWNEE COUNTY, et al.	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff filed the instant action pursuant to 42 U.S.C. § 1983 on January 24, 2003. On April 19, 2004, defendants filed a Motion for Summary Judgment (Doc. 23). Plaintiff's response was due on May 12, 2004. On May 18, 2004, the court directed plaintiff to show cause, in writing, on or before May 28, 2004, why defendants' Motion for Summary Judgment (Doc. 23) should not be granted. The court further directed plaintiff to file a response to defendants' motion on or before May 28, 2004. The court specifically cautioned plaintiff: "**Should plaintiff fail to timely show cause and file a response, defendants' Motion for Summary Judgment (Doc. 23) will be considered without the benefit of a response from plaintiff."** To date, plaintiff has failed to respond to the court's show cause order and has failed to respond to defendants' Motion for Summary Judgment.

Rule 7.4 of the Rules of Practice provides that the "failure to file a brief or response within the time specified within [Rules 6.1 and 7.1(c)] shall constitute the waiver of the right thereafter to file such brief or response, except upon a showing of excusable neglect." D. Kan. R. 7.4; *see*

also Reed v. Bennett, 312 F.3d 1190, 1195 (10th Cir. 2002) (noting in summary judgment context that by "failing to file a response within the time specified by the local rule, the nonmoving party waives the right to respond"). Because plaintiff has failed to respond to the instant motion, the court will makes its ruling without the benefit of a response from plaintiff.

I. Facts[1]

A. Underlying Incident

On October 9, 2002, Shawnee County Deputy Sheriffs Shane Harris and John Peterson went to 1811 SE 20th Street to execute an arrest warrant for plaintiff. As plaintiff came out the back door of the residence and saw the officers, he made a sound with his mouth. After the sound, three dogs came toward Deputy Harris growling, barking, and snarling. Deputy Harris sprayed all three dogs with pepper spray. Despite being instructed to stay outside the residence, plaintiff went back inside. The officers followed him inside, at which time they explained to him that they had a warrant for his arrest.

After putting on a shirt, plaintiff reached into his pockets and pulled out an opened knife. Plaintiff told the officers he was going to use the knife to clean his fingernails. After being instructed by the officers to put the knife down, plaintiff complied. In the meantime, plaintiff's wife had placed the dogs into a closed bedroom. Plaintiff walked into the bedroom where the dogs were and shut the door behind him. The officers instructed plaintiff to come out of the bedroom and, as he did, the three dogs came out. Deputy Harris ordered him to put the dogs back in the

[1]Because plaintiff wholly failed to respond to defendants' summary judgment motion, the court deems admitted for purposes of summary judgment those facts set forth by defendants. D. Kan. Rule 56.1(a).

bedroom. Plaintiff refused to do so. Deputy Harris then drew his sidearm, repeating his order to plaintiff to put the dogs back in the bedroom. Plaintiff continued to refuse the order. Deputy Harris asked Deputy Peterson for his can of pepper spray.

At that point, plaintiff became irate and called Deputy Harris a "high and mighty nigger." Plaintiff stated, "You don't know nothing about me do you Uncle Tom. I don't give a fuck about you or anybody." Plaintiff then told his wife to call the media and tell them that sheriff officers were in his house spraying and shooting his dogs. Plaintiff further stated that she should tell the media that there was a "nigger in their house with an attitude." During this time, plaintiff referred to Deputy Harris as a "fucking nigger with a statute."

Deputy Harris handcuffed plaintiff. At that point, plaintiff asked Deputy Harris what his name was. Deputy Harris replied "Harris." As the officers were walking plaintiff out to their patrol car, plaintiff stated several times that Officer Tony Patterson had "got what was coming to him."[2] Plaintiff told the officers that if they were pointing guns in his house, the same thing should happen to them. Plaintiff also told the officers that all law enforcement had better beware in the future if they go to his house. Plaintiff told Deputy Harris that the next time he saw him, he (Harris) was guaranteed to end up just like Tony Patterson. The deputies drove plaintiff to the jail. During the transport to the jail, plaintiff continued to yell and call Deputy Harris "a nigger" and that he would get what was coming to him.

[2]Officer Tony Patterson was killed during an early morning drug raid at 1519 S.W. Mulvane on October 12, 1995.

Once inside the sally port of the jail, plaintiff yelled at Deputy Harris "fuck you and your bald headed momma." Plaintiff said that Deputy Harris' mother could or would end up dead as well. Plaintiff admits that he made references to Deputy Harris' mother. In fact, plaintiff has been to the agency called "Let's Help," where Deputy Harris' mother is employed.

Deputy Harris exited the patrol car and stated to Deputy Peterson "I'll get him out." Deputy Harris then opened the back door where plaintiff was seated, and stated to him, "do not talk about my momma." Deputy Harris reached into the car and placed his hands on the neck and shoulder area of plaintiff. Deputy Harris's left hand was on plaintiff' shoulder or on the back of the seat, his right hand was around the front of plaintiff throat. Deputy Harris placed his thumb and center finger on the pressure points located at the base of plaintiff' jaw where the jaw and muscle come together. At this point, Corrections Specialists Hanser and Randles, along with Lieutenant Tommy Ayers from the Shawnee County Jail, approached plaintiff and Deputy Harris. Lt. Ayers told Deputy Harris to let go of plaintiff, and Officer Randles pulled plaintiff away and led him toward the book-in area of the jail. At that point, plaintiff stated to Lt. Ayers, "you saw him Tommy, you're my witness, he grabbed my throat."

While he was being led away by the officers, plaintiff yelled, "take these cuffs off and I'll kick his ass." As plaintiff was being led to the book-in area, he continued to say things to antagonize Deputy Harris. At that point, Deputy Harris took two steps toward the pat down area, stopped, then walked back to the patrol car and handed his sidearm to Deputy Peterson and told him to secure it. Deputy Harris then started back to the book-in area and told the corrections

officers, "if he [Williams] wants out of the cuffs, let him out." Lt. Ayers stopped Deputy Harris from coming into the book-in area and escorted him back to his patrol car.

In the book-in area of the jail, plaintiff continued to tell Lt. Ayers that he was his witness and that he was going to "sue the County." Plaintiff then used the telephone to call several people, including his attorney and the news media. While Plaintiff was in the book-in area, Officer Randles noted that plaintiff kept talking about lawsuits and speaking to the media and that he "was going to make some money off this." None of the officers who dealt with plaintiff in the book-in area of the jail noted in their reports that he was complaining of any neck injury.

On October 9, 2002, Deputy Harris filed an Offense Report alleging that plaintiff had made criminal threats against him and his mother and had committed an assault on a law enforcement officer.

B. Medical Treatment

Officer Hanser reported that he saw plaintiff' neck after the incident and that there were no marks on it. On October 9, 2002, the date of the incident in question, plaintiff was given a health screening by Prison Health Services (PHS). When asked if he had any pain, plaintiff stated that his neck hurt. He also outlined a number of preexisting health problems. PHS nursing staff offered pain pills to plaintiff, which plaintiff refused, stating that "it doesn't hurt that bad." Plaintiff told the nurse he wanted to wait until the next day to see how it felt. At that time, plaintiff refused to sign a statement acknowledging that he was refusing treatment. The PHS nurse that examined plaintiff noted that there were no bruises, scratches, or bleeding to his neck area.

On October 15, 2002, plaintiff complained of neck pain "off and on." Plaintiff was examined by a PHS staff nurse, who noted that plaintiff's neck was supple, with full range of motion, and that there were no visible bruises or swelling. Plaintiff was scheduled to see the doctor on the next day for health concerns not related to the October 9, 2002 incident.

On October 16, 2002, plaintiff was examined by Dr. Norris, who noted that plaintiff exhibited slightly reduced range of motion in his neck when he was asked to move it. Dr. Norris noticed that plaintiff didn't appear to have any problem moving his neck until she specifically asked him to do so. Dr. Norris prescribed Tylenol.

C. Investigation and Discipline of Deputy Harris

On October 10, 2002, the Shawnee County Sheriff's Office began an investigation of the incident. The Professional Standards Unit of the Shawnee County Sheriff's Office conducted the investigation. Detective Scott Holladay interviewed plaintiff, Deputy Harris, Lt. Ayers, Officer Hanser, and Officer Randles.

When asked, "Do you recall how long Deputy Harris had his hand at your throat?" Plaintiff answered, "I have no idea how long. One second, a half a second, it was wrong."

During Officer Randles's interview, he stated that Deputy Harris had his hand at plaintiff' throat for "maybe three seconds." Also, when interviewed about the incident, Officer Hanser noted, "Williams was doing a lot of yelling so I don't think he was being choked. He didn't sound like he was being choked."

During his interview, Deputy Harris was asked if he thought his actions were appropriate. He responded by saying that he should have let the corrections staff handle plaintiff. However, he

stated that he didn't strangle or choke plaintiff. Deputy Harris stated that his intent was to touch plaintiff's pressure points and send plaintiff a message that he was serious about plaintiff not bringing any harm to him or his mother.

On October 22, 2002, the sheriff's office internal investigation was concluded. On November 5, 2002, Shawnee County Sheriff Richard Barta issued a memo to Deputy Harris stating that his actions with regard to plaintiff violated Shawnee County Sheriff's Office General Order 87-007(III c & d) regarding professional conduct. Deputy Harris was suspended for three days without pay as a sanction.

II. Summary Judgment Standards

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.* (citing *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Id.* at 670-71. In attempting to

meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Id.* at 671 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256; *see Adler*, 144 F.3d at 671 n.1 (concerning shifting burdens on summary judgment). The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256. Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler*, 144 F.3d at 671. "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.* Finally, the court notes that summary judgment is not a "disfavored procedural shortcut;" rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

The court acknowledges that plaintiff appears pro se. However, this does not excuse plaintiff from the burden of coming forward with evidence to support his claims as required by the Federal Rules of Civil Procedure and the local rules of this court. *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988). Even a pro se plaintiff must present some "specific factual support" for his allegations. *Id.*

III. Discussion

A. Deputy Harris

Defendants contend that Deputy Harris is entitled to summary judgment on the basis of qualified immunity. Qualified immunity protects police officers from liability when acting within the scope of their employment. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity provides government officials immunity from suit as well as from liability for their discretionary acts. *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985); *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 644 (10th Cir. 1988). The doctrine of qualified immunity serves the goals of protecting public officials "who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978).

The Supreme Court has established a two-part approach to determine if qualified immunity applies. "[T]he better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question." *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 516 (10th Cir. 1998) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 842 n. 5 (1998)). Thus, the court follows this two-step test to analyze the issue of qualified immunity raised

by defendants here. *Butler v. City of Prairie Village, Kan.*, 172 F.3d 736, 745 (10th Cir. 1999).

In *Graham v. Connor*, 490 U.S. 386, 397 (1989), the Supreme Court held that a claim of excessive use of force by police officers should be analyzed under the Fourth Amendment's objective reasonableness standard. Under this standard, the reasonableness of an officer's use of force must be viewed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. The Court recognized that:

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving . . . about the amount of force that is necessary in a particular situation. *Id.*, 490 U.S. at 396-397 (Internal citations and quotations omitted.)

Id. at 396-97. Whether an officer acted reasonably is a legal determination in the absence of disputed material facts.

The Fourth Amendment standard requires inquiry into the factual circumstances of every case. The relevant factors for the court's consideration include the crime's severity, the potential threat posed by the suspect to the officer's and others' safety, and the suspect's attempts to resist or evade arrest. *Medina v. Cram*, 252 F.3d 1124, 1131 (10th Cir. 2001). The court also considers the events immediately leading up to the incident in question. *Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994) ("Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable.").

In this case, immediately prior to the incident, plaintiff had unleashed his dogs on the deputies, resisted their efforts to arrest him by failing to follow their directives, and pulled out a large knife in their presence. Before, during, and after the incident, plaintiff cursed the officers and threatened repeatedly to kill Deputy Harris and his mother. At the time, Deputy Harris knew that plaintiff was acquainted with Deputy Harris' mother. Specifically, plaintiff knew where she worked. In light of these facts, Deputy Harris had reason to believe that plaintiff, or persons associated with him, would do harm to himself or his mother. In response to this evolving situation, Deputy Harris reached into the back of the car, and, according to the evidence in the record, grabbed plaintiff by the shoulder and placed his hand on the pressure points under plaintiff' neck.

The court next looks to the extent of the plaintiff's injury. While it is true that an excessive force claim under the Fourth Amendment may be made without proof of physical injury, the plaintiff still must prove that the amount of force used was "sufficiently egregious to be of constitutional dimensions." *Martin v. Bd. of County Comm'rs*, 909 F.2d 402, 407 (10th Cir. 1990). In this case, the evidence in the record demonstrates that the force applied by Deputy Harris was minimal. Contrary to the allegations in the complaint, Deputy Harris did not choke plaintiff. Rather, according to witness testimony, plaintiff continued to verbally threaten Deputy Harris while Deputy Harris was applying force; consequently, the logical conclusion is that plaintiff's airway was not obstructed. The evidence in the record further establishes that Deputy Harris's hand was on plaintiffs' neck for three seconds, and by plaintiff's own account, possibly even less. In addition, plaintiff suffered no identifiable medical injury as a result of this incident. "If

the injury is minimal, it is likely that the force creating the injury is minimal." *Hannula v. City of Lakewood*, 907 F.2d 129, 132 (10th Cir. 1990).

The court does not condone the actions of Deputy Harris and, in fact, utterly disapproves of Deputy Harris's display of unprofessional conduct. Having said that, the court finds as a matter of law that Deputy Harris's use of force did not rise to the level of a constitutional violation. Because the court has concluded that plaintiff failed to allege a deprivation of a constitutional right, the court need not proceed to the second step of the qualified immunity test.

B. Remaining Defendants

Because the court has determined that plaintiff's constitutional rights were not violated by Deputy Harris, the court need not address plaintiff's claims against the county or sheriff's department. Absent an underlying constitutional violation, these entities cannot be liable under § 1983. *See Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445, 1447 (10th Cir.1990) (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)). The court grants summary judgment on plaintiff's claims against these defendants.

IT IS THEREFORE ORDERED that defendants' Motion for Summary Judgment (Doc. 23) is granted. This case is hereby dismissed.

Dated this 14th day of July 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge